FILED
MAR 21 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 660

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN and DR. SOPHIA BERKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAX SWIREN
HUBERT H. NEXON,
Attorneys for Petitioner.

SWIREN & HEINEMAN
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

The Scheffer Printing Company, FInancial 6-3044

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Summary Statement of Matter Involved	2
Questions Presented	7
Reasons for Granting Certiorari	8
Argument in Support of Petition	9
I. In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question in conflict with the decision of this Court in *Erwin* v. *Lowry*, 7 How. 172 (1849), and in conflict with the decision of the Court of Appeals for the First Circuit in *Jones* v. *Pettingill*, 245 Fed. 269 (C.A. 1st 1917), cert. denied 245 U. S. 663 (1917)	9
II. In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question with respect to appellate practice which should be decided by this Court, because of the practical inconsistency of the decision of the court of appeals with the Rules of Civil Procedure, Rule 62(d), and the statutory provision for interest on judgments, 28 U.S.C. § 1961	13
Conclusion	15

Authorities.

Cases.

PAGE

Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co., 249 U. S. 134 (1911) 11, 13

Erwin v. Lowry, 7 How. 172 (1849) 8, 9, 10, 13, 16

Hoiness v. United States, 335 U. S. 297 (1948) 12

Jones v. Pettingill, 245 Fed. 269 (C.A. 1st, 1917) cert. denied 245 U. S. 663 (1917) 8, 9, 11, 13

Merriam v. Haas, 3 Wall. 687 (1864) 10

Northwestern Fuel Co. v. Brock, 129 U. S. 216 (1891) 11, 13

United States v. Dashiel, 3 Wall. 688 (1866) 11

Statutes and Rules.

Federal Rules of Civil Procedure, Rule 61 14

Federal Rules of Civil Procedure, Rule 62(d) 8, 13, 14

United States Code, Title 28, § 391 (Repealed) 15

§ 1254(1) 2

§ 1291 9

§ 1961 ..... 8, 13, 14

Act of June 25, 1948 C. 645 § 21, 64 Stat. 862 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN and DR. SOPHIA BERKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner herein, by his duly authorized attorneys, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 20, 1948 (R. 451), rehearing denied January 14, 1949 (R. 473). The court of appeals dismissed the appeal of Spanel, the petitioner here, from a judgment adverse to him in the trial court, without consideration of the merits, on the sole ground that Spanel had accepted a small sum of money awarded by an otherwise adverse judgment of the trial court.

In support of this petition, your petitioner respectfully shows:

Opinions Below

The district court did not prepare or publish a formal opinion. The opinion of the court of appeals (R. 442) is reported at 171 F. (2d) 513.

Jurisdiction

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, §1254(1).

Summary Statement of Matter Involved

On April 5, 1945, A. N. Spanel, the petitioner, and the respondents, Dr. Sophia Berkman and Dr. Boris Berkman, entered into a contract for research on the medical utility of colloidal chlorophyll, a new product produced by the Berkmans (R. 254-265, 32). The Berkmans agreed to construct and operate a pilot plant for the production of colloidal chlorophyll and to conduct animal and clinical experimentation with that product. Spanel agreed to and did provide $25,000 in cash to be expended exclusively for the pilot plant construction and operation and the experimentation. The contract expressly provided that no part of the fund supplied by Spanel was to be "paid to, or retained by, the Inventors [the Berkmans] as compensation or otherwise. . ." The contract specified that the animal and clinical experimentation was for determination of the medicinal and therapeutic value of colloidal chlorophyll, and the operation of the pilot plant for determination of the cost of commercial production (R. 256-7, 380, 394-5).

At any time after December 31, 1946, Dr. Boris Berkman was permitted by the contract to certify to Spanel his

determination that the production, sale and use of colloidal chlorophyll for pharmaceutical, therapeutic and medicinal purposes were commercially feasible. The contract required that the certificate (1) be based upon reliable research data, from animal and clinical experiments, establishing medicinal value, (2) be based upon reliable research data, from the pilot plant operation, establishing commercial feasibility, and (3) be made in good faith. Upon the rendering of a certificate which complied with the contract, Spanel was required to elect, within thirty days, either to invest $125,000 in a corporation to be formed for the exploitation of colloidal chlorophyll, or to abandon all his rights in the Berkman process and product (R. 258-9, 395).

After receiving the $25,000 from Spanel, the Berkmans proceeded with the production and experimental use of colloidal chlorophyll and expended nearly all of Spanel's $25,000 for that purpose (R. 215-6, 380-3, 242). On December 3, 1946, the Berkmans rendered a report on their research, and on January 16, 1947, Dr. Boris Berkman delivered to Spanel a certificate reciting his determination that it was commercially feasible to produce, sell and use colloidal chlorophyll for pharmaceutical, therapeutic and medicinal purposes. Dr. Berkman then called upon Spanel either to forfeit all his interest in the colloidal chlorophyll project, or to invest an additional $125,000 in a corporation to be formed for the exploitation of colloidal chlorophyll (R. 398-9, 266, 32).

Immediately upon the delivery of the Berkman certificate, the operation of the pilot plant and all further research stopped (R. 118).[1] As appears from the evidence,

[1] The one exception was an animal research project in the process of completion at the University of Wisconsin already paid for with Spanel's funds (R. 107-8).

Spanel's funds had, for all practical purposes, been exhausted, and the balance of $973.98 remaining could not finance any further research. Along with the certificate of January 16, 1947, Dr. Berkman had sent a letter in which he stated:

> "I believe that my sister and I have accomplished in full all that could possibly be expected under these arrangements, particularly in the light of the amount of money at our disposal." (R. 267, 269-70, 32.)

On pre-trial deposition read into evidence, Dr. Berkman testified that he terminated research because "I did not have any money left at all" (R. 119), and at the trial, Dr. Berkman testified that he produced no more colloidal chlorophyll because he did not have any more funds (R. 118).[2]

On February 13, 1947, Spanel filed his complaint for declaratory judgment in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking a declaration that the Berkman certificate was invalid because it lacked good faith and was unsupported by the reliable research data the contract required. Spanel further sought a declaration that the research phase of the project had not been terminated and, therefore, that the Berkman attempt to make him elect between an investment of $125,000 and an abandonment of his interest in the exploitation of colloidal chlorophyll was ineffective (R. 2-4). Jurisdiction of the district court was based on diversity of citizenship and the requisite jurisdictional amount (R. 394).

Dr. Berkman testified at the trial that his certificate was based exclusively upon the usefulness of colloidal chlo-

---

[2] It was the acceptance by Spanel of the return of $973.98, the insignificant residue of the $25,000 fund provided exclusively for research under the contract, which was ultimately held to bar his appeal, although that residue, as appears above, was concededly inadequate for further research.

rophyll as a vitamin product (R. 72, 82-3, 97, 105-6). Dr. Berkman conceded, however, that the value of colloidal chlorophyll as a vitamin source had been determined only theoretically and that notwithstanding the contract requirement of clinical experimentation, he had made no clinical studies of the vitamin usefulness of his product (R. 114-5). Further, although the contract provided specifically that the Berkmans were to "ascertain the cost of commercial production of colloidal chlorophyll" (R. 257), Dr. Berkman conceded that he had made no such determination (R. 86, 244-5, 249, 250).[3]

After trial on the merits, the district court denied the relief sought by Spanel and gave judgment in favor of the Berkmans on the main issues of the case. The district court held that (1) the Berkman certificate was supported by reliable research data establishing therapeutic value and commercial feasibility, (2) the certificate being valid, Spanel had forfeited his rights, (3) the pilot plant and the small unexpended cash balance ($973.98 out of $25,000.00) remained the property of Spanel (R. 401-2).

Judgment was entered on October 15, 1947 (R. 402). On November 6, 1947, without execution having been issued, the Berkmans voluntarily paid Spanel the sum of $973.98, the unexpended balance of Spanel's funds found to be his by the district court, and a document entitled "Partial Satisfaction of Judgment," reflecting the pay-

[3] Although the ultimate finding of the trial court was that the Berkman certificate met the requirements of the contract of April 5, 1945, the detailed findings showed that only animal and not clinical experimentation had been conducted with colloidal chlorophyll as a vitamin source, and that only raw material cost and not the cost of production of colloidal chlorophyll had been determined (Findings 13, 16; R. 396-7). There was a total absence of the clinical experimentation and determination of cost and commercial feasibility specifically required by the contract as a foundation for the certificate; on this there is no dispute in the evidence.

ment, was filed in the district court (R. 403). Thereafter, Spanel filed in the district court a timely notice of his appeal to the Court of Appeals for the Seventh Circuit (R. 404).

On February 16, 1948, the Berkmans filed a motion to dismiss the appeal of Spanel on the ground that his acceptance of the $973.98, found to be his by the district court, operated as a waiver of his right to appeal (R. 423-4). In his response to the motion to dismiss, Spanel offered, in the event that the court was in doubt about his right both to retain that sum and to prosecute his appeal, to deposit the funds with the clerk of the court of appeals to await disposition by that court (R. 425-6). The motion was denied but leave was given for its renewal upon argument on the merits (R. 429). The motion was then renewed (R. 431), and in response Spanel repeated his tender of the $973.98 for deposit with the clerk to await the direction of the court of appeals (R. 440). The court of appeals dismissed Spanel's appeal (R. 451). It held that his receipt of the $973.98 and his partial satisfaction of judgment below operated as an estoppel and waiver of his statutory right to appeal because inconsistent with the relief he sought in the court of appeals (R. 442-450). The court also ruled that Spanel's tender of the $973.98 to await its direction could not be given effect because to do so would render the "general rule" which the court of appeals applied "meaningless" (R. 449).

Questions Presented

I.

Whether the court of appeals erred in determining that the acceptance by Spanel of an incidental benefit under a judgment adverse to him waived his statutory right of appeal.

II.

Whether, even if the acceptance of such a benefit may operate as a waiver, the court of appeals erred in refusing to relieve Spanel of the waiver, upon his tender of the $973.98 he had previously accepted.

III.

Whether, even if the acceptance of such a benefit under an adverse judgment may under some circumstances operate as a waiver, the court of appeals erred in regarding Spanel's acceptance of a benefit as inseparable from the portion of the judgment appealed from and as a waiver under the circumstances of this case.

Reasons for Granting Certiorari

I.

In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question in conflict with the decision of this Court in *Erwin* v. *Lowry*, 7 How. 172 (1849), and in conflict with the decision of the Court of Appeals for the First Circuit in *Jones* v. *Pettingill*, 245 Fed. 269 (C. A. 1st 1917), cert. denied 245 U. S. 663 (1917).

II.

In so deciding, the court of appeals decided an important federal question with respect to appellate practice which should be decided by this Court, because of the practical inconsistency of the decision of the court of appeals with the Rules of Civil Procedure, Rule 62(d), and the statutory provision for interest on judgments, 28 U. S. C. § 1961.

ARGUMENT IN SUPPORT OF PETITION.

I.

In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question in conflict with the decision of this Court in Erwin v. Lowry, 7 How. 172 (1849), and in conflict with the decision of the Court of Appeals for the First Circuit in Jones v. Pettingill, 245 Fed. 269 (C. A. 1st 1917), cert. denied 245 U. S. 663 (1917).

The court of appeals dismissed Spanel's appeal on the single ground that his acceptance of benefits under the district court's judgment was inconsistent with an appeal from that judgment. Accordingly, it found that a waiver or estoppel existed, and that Spanel was permanently barred from prosecuting his appeal. The duty of the court to consider Spanel's appeal is statutory (Title 28 United States Code § 1291), but its refusal to hear the appeal rests solely on an assumed rule of practice as to which it thought there was "little if any dispute". Such a rule of practice affecting the statutory right of appeal is not only without sanction in the decisions of this Court, but is in conflict with them.

In *Erwin* v. *Lowry*, 7 How. 172 (1849), this Court ruled on the precise proposition here presented. There Lowry sought to recover from Erwin property allegedly taken illegally. Lowry had judgment in the court of first instance, and Erwin was ordered to convey to him the property sought by Lowry's petition. The Supreme Court of Louisiana affirmed, but directed that Lowry be put into possession of the property awarded to him only after he had deposited, either with Erwin or with the sheriff of

the parish, the sum of $436.55. Lowry deposited that sum with the sheriff, and Erwin, although he was under no compulsion so to do, accepted it from the sheriff and receipted therefor. Erwin sued out a writ of error from this Court. Lowry, thereupon, moved to dismiss on the ground that Erwin's acceptance of the fund and the issuance of his receipt operated as a release of errors. The Court denied the motion to dismiss, saying:

> "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." (7 How. 172, 184).

Erwin v. *Lowry* was twice called to the attention of the court of appeals (R. 439, 455). It is controlling on the motion to dismiss. Without even mentioning the decision of this Court, the court of appeals held directly contrary to the *Erwin* case that a release of errors *was* implied—and hence the right of appeal waived—by the acceptance of money under the judgment. In so doing, the court of appeals followed a line of cases in other courts of appeals which also ignored *Erwin* v. *Lowry*.

Erwin v. *Lowry* has never been criticized or overruled by this Court. It appears to have been followed (again in a decision in conflict with the action of the court of appeals in the instant case) in *Merriam* v. *Haas*, 3 Wall. 687 (1864) (incompletely reported). This Court has subsequently held on numerous occasions, although in a different con-

text, that, in the absence of a *supersedeas,* no rights are affected by proceeding under an erroneous decree. Upon reversal, it becomes the duty of the courts to restore the *status quo ante.* The performance of this duty has been directed even where the court granting restitution was otherwise without jurisdiction of the action. *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216 (1891). And this Court has rested such decisions on *Erwin* v. *Lowry,* the very case which the court of appeals has disregarded. *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 145 (1911). *United States* v. *Dashiel,* 3 Wall. 688 (1866), although not presenting the same direct conflict with the decision of the court of appeals in the instant case as does *Erwin* v. *Lowry,* is entirely inconsistent with it in theory. There a judgment creditor had obtained partial satisfaction of its judgment on execution. Unlike the instant case, moreover, the amounts received were a part of a unitary judgment at law which had apparently been challenged by the judgment debtor. This Court, unembarrassed even in 1866 by the technical notion of estoppel which controlled the court of appeals here, refused to dismiss the judgment creditor's writ of error.

The dismissal of the appeal of Spanel being plainly in conflict with this Court's decision in *Erwin* v. *Lowry,* it is perhaps unnecessary to add that it is also in conflict with the decision of the Court of Appeals for the First Circuit in *Jones* v. *Pettingill,* 245 Fed. 269, 276-277 (C. A. 1st 1917), *cert. denied* 245 U. S. 663 (1917). There Pettingill brought an action against Jones to recover property in Jones' possession. The relief sought by Pettingill was granted, but he was required to pay to Jones the sum of $1,464.55 as a result of certain expenditures made by Jones which benefited the property. Immediately after the entry of the district court's decree,

Jones accepted from Pettingill the sum of $1,464.55 and filed his receipt for that amount with the court, reciting therein that it was "in full compliance with the order" of the court. Thereafter Jones appealed to the court of appeals, and Pettingill moved to dismiss on the ground that Jones' acceptance of the sum paid him constituted an estoppel. The court of appeals, relying upon *Erwin* v. *Lowry,* refused to hold that Jones had forfeited his right to appeal. It said:

> "The right to appeal is a right not to be held waived, except upon clear and decisive grounds. The District Court, which holds his [Jones'] receipt, can, upon reversal, restore both parties to their rights as they stood before said payment was made, by directing proper repayment to Pettingill." (245 Fed. 269, at 277.)

This decision of the Court of Appeals for the First Circuit is squarely in conflict with the judgment below in the Seventh Circuit. And again no explanation of the conflict is attempted in the opinion of the court of appeals.

The decision below rests upon a doctrine serving no useful purpose in the administration of justice and operating only as the most technical kind of trap for the unwary. Cf. *Hoiness* v. *United States,* 335 U. S. 297 (1948). The judgment was in three parts. The first held the Berkman certificate to be in compliance with the contract requirements. From that portion of the judgment Spanel appealed. The second held that the pilot plant, built with Spanel's money, was his property. From that portion of the judgment the Berkmans appealed and judgment was affirmed. The third provided that the small unexpended balance of Spanel's money ($973.98) remained Spanel's property. No appeal from this portion of the judgment was taken by any party. The money was voluntarily paid

by the Berkmans and accepted by Spanel. Upon that basis alone Spanel was denied his statutory right of review of the judgment holding the Berkman certificate valid and Spanel's investment forfeited. Apart from the fact that the small incidental money judgment went unchallenged by any party, its acceptance could not possibly have prejudiced the Berkmans, respondents here, *first,* because there was inherent power in the court to restore to the Berkmans whatever they had paid, in the event the judgment was subsequently reversed (*Erwin* v. *Lowry,* 7 How. 172 (1849); *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216 (1891); *Arkadelphia Milling Co.* v. *St. L. S. W. Ry. Co.,* 249 U. S. 134 (1911); and *second,* because, whatever the power of the courts to enforce restitution, Spanel had voluntarily tendered the funds he had received, for disposition by the court.

II.

In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question with respect to appellate practice which should be decided by this Court, because of the practical inconsistency of the decision of the court of appeals with the Rules of Civil Procedure, Rule 62(d), and the statutory provision for interest on judgments, 28 U. S. C. § 1961.

Even in the absence of the conflict with the decisions in *Erwin* v. *Lowry,* 7 How. 172 (1849) and *Jones* v. *Pettingill,* 245 Fed. 269 (C. A. 1st 1917), *cert. denied* 245 U. S. 663 (1917), the instant case would present an important question of federal practice meriting the attention of this court, since the decision below cannot be reconciled, in principle, either with the statute governing interest on judgments, 28 U. S. C. § 1961, or the rule governing the

method of obtaining a stay of judgment while an appeal is pending, Fed. R. Civ. P. 62 (d).

First, the court's decision is inconsistent, as a practical matter, with Rule 62(d) of the Federal Rules of Civil Procedure which permits a stay of execution only after the person seeking the stay has filed a supersedeas bond approved by the court. Under the decision of the court of appeals a stay is in fact imposed where a litigant is only partially successful, without compliance with or reference to Rule 62(d). A judgment creditor is compelled either to forego execution, even though no supersedeas has been filed, or to forfeit a statutory review on the merits of the portion of the judgment adverse to him.

Second, the holding of the court of appeals is inconsistent as a practical matter with 28 U. S. C. § 1961. That section of the Judicial Code allows interest on any money judgment recovered in a civil case in the district court. Of course, interest may be stopped by an appropriate tender. The rule applied by the court of appeals confronts litigants, awarded a judgment in part but seeking to appeal, with the alternative of either giving up the right to interest under 28 U. S. C. § 1961, or giving up the right to appeal under 28 U. S. C. § 1291. No such alternative can be read into the statute or justified on principle.

The court of appeals, by making forfeiture of the right to appeal the price of accepting voluntary performance by a judgment debtor of his obligations, has imposed a penalty on the judgment creditor. The rule and statute were designed to protect, not penalize him.

The absence of prejudice being so clearly established, the action of the court of appeals in denying Spanel his right to a review flies in the face of the settled policy of the federal courts to avoid affecting substantial rights

because of insubstantial procedural defects. Cf. Federal Rules of Civil Procedure, Rule 61. The policy, requiring a reversal of the judgment of the court of appeals here, is set forth with great clarity in section 269 of the old Judicial Code[4] which read in part as follows:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

CONCLUSION

Petitioner has been denied his right of appeal by the application of a technical, irrational notion of estoppel. The acceptance of an incidental benefit, to which he was admittedly entitled, was held by the court of appeals to forfeit the right of appeal even though petitioner had tendered for deposit with the court the small amount he had received. The payment of what was due prejudiced no one; and the tender of the amount to the clerk of the court erased even imagined prejudice. The application of estoppel under such circumstances is in direct conflict with the decisions of this Court and of the Court of Appeals for the First Circuit. More than that, it brings to appellate procedure a formalistic, hyper-technical approach repugnant to the simplified system of federal practice designed to promote the ends of justice. The court of appeals in the

[4] 28 U. S. C., Sec. 391. Although this statute has now been repealed (Act of June 25, 1948, c. 645, Sec. 21, 64 Stat. 862, effective September 1, 1948) it is applicable to cases pending at the time of repeal, since prior rights and liabilities are not affected by the repeal. **Hoiness v. United States**, 335 U. S. 297, 300-1, note 6 (1948). The instant appeal was taken and was pending prior to September 1, 1948 (R. 404).

instant case has reverted to an approach in which substantive rights must yield to technical notions of consistency. Even a hundred years ago, when it decided *Erwin* v. *Lowry,* this Court did not subscribe to that approach to justice.

Accordingly, petitioner prays that a writ of certiorari may be issued to the United States Court of Appeals for the Seventh Circuit in the cause entitled *A. N. Spanel,* Plaintiff-Appellant, v. *Dr. Boris Berkman, et al.,* Defendants-Appellees, No. 9534 in that Court, in order that the judgment of the court of appeals dismissing petitioner's appeal may be reviewed by this Court.

Respectfully submitted,

MAX SWIREN
HUBERT H. NEXON,
Attorneys for Petitioner.

SWIREN & HEINEMAN
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

FILE COPY

Supreme Court, U. S.

Oct[illegible] Term, A. D. 1947.

No. 669

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BEEKMAN and DR. SOPHIA BEEKMAN,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR CERTIORARI.

Max Swerdlow,
Herbert H. Hirsch,
Attorneys for Plaintiff-Appellant, Petitioner.

Swerdlow & Heffernan,
Suite 1400
135 South LaSalle Street,
Chicago 2, Illinois,
Of Counsel.

The Schaffer Printing Company, Financial 6-3694

TABLE OF CONTENTS

PAGE

The Facts 1

I. The Decision Below is Clearly in Conflict with the Decisions of This Court and of the Court of Appeals for the First Circuit 3

A. Conflict with *Erwin* v. *Lowry*, 7 How. 172 (1849) 3

B. Conflict with *United States* v. *Dashiel*, 3 Wall. 688 (1866) 3

C. Conflict with *Jones* v. *Pettingill*, 245 Fed. 269 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917) 4

D. The cases on which the respondents rely 4

II. Conflict with Rule 62(d), Rules of Civil Procedure, and 28 U.S.C. §1961 5

III. There is No Question of State Law Before This Court 6

Conclusion 7

Authorities Cited.

Cases:

Crawshay v. Soutter, 6 Wall. 739 (1868) 4

Deitrick v. Greany, 309 U. S. 190 (1940) 6

Embry v. Palmer, 107 U. S. 3 (1882) 3, 4, 5

Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938) .. 6

Erwin v. Lowry, 7 How. 172 (1849) 3, 6

Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188 (1942) 6

Gilfillan v. McKee, 159 U. S. 303 (1895) 5

Guaranty Trust Co. v. York, 326 U. S. 99 (1945) 6

Jones v. Pettingill, 245 Fed. 269 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917) 4

PAGE

Prudence Corporation v. Geist, 316 U. S. 89 (1942) .. 6
United States v. Benedict, 261 U. S. 294 (1923) 4
United States v. Dashiel, 3 Wall. 688 (1866) 3, 5
Woodworth v. Chesbrough, 244 U. S. 79 (1917) 4

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 62(d) 5
United States Code, Title 28, §1291 6
§1961 5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN and DR. SOPHIA BERKMAN,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR CERTIORARI.

May It Please the Court:

The Facts.

The appeal was dismissed by the Court of Appeals upon the ground that the acceptance of $973.98, the unexpended balance of the research fund ordered returned to Spanel by the District Court, constituted a waiver of the right of appeal (R. 442, 445-9). The motion to dismiss was predicated upon the same single ground (R. 423-4, 431-2). Respondents now seek to bolster their position by the suggestion, for the first time, that Spanel took possession of the pilot plant "consistently" with the judgment of the District Court. They imply that the satisfaction filed related to something more substantial than the portion of the judgment awarding Spanel $973.98 and included the award of the pilot plant that cost almost $10,000 (Res. Br. 3). That is simply not true. The only record support offered refers to the "partial satisfaction of judgment," which deals only with the small cash payment (R. 403).

Actually the pilot plant, essential to the continuation of the contract, had been abandoned by the Berkmans, who declined to pay rent for its preservation even out of the $973.98 remaining in their hands. Spanel stepped in, paid the rent and preserved the plant months before the District Court trial and judgment (R. 145, 242, 383).

The motion for dismissal not being grounded upon the disposition of the pilot plant, the Court of Appeals was neither called upon to, nor did it, examine the facts with respect thereto. Its judgment rested entirely upon Spanel's action in "accepting and satisfying this *part* of the judgment" with respect to the $973.98 (R. 445, emphasis supplied).

Respondents also ignore the fact that the Berkmans were specifically prohibited by the contract from retaining this money except for the purpose of research and that they had under oath disavowed its usefulness for that purpose (R. 118-9, 257). Accordingly, the money was Spanel's on any theory.[1]

The award of the small unexpended cash balance to Spanel was therefore not dependent upon the termination of the contract and the District Court did not assign that ground for its judgment (R. 402).

---

[1] Moreover, Spanel expended far more than $973.98 to preserve the pilot plant. Dr. Berkman stopped paying the $300 monthly rent on the pilot plant premises in April, 1947 (R. 242, 383). Spanel then assumed that burden and was still paying the rent five months later at the time of the trial (R. 145). The award of the $973.98 to Spanel was, thus, consistent with the continued force of the contract, either as a refund of sums inadequate for research, or as reimbursement of rent advanced to preserve the pilot plant and the project.

I.

The Decision Below is Clearly in Conflict with the Decisions of This Court, and of the Court of Appeals for the First Circuit.

A. Conflict with Erwin v. Lowry, 7 How. 172 (1849).

To avoid the square conflict between the decision below and this Court's decision in *Erwin* v. *Lowry,* 7 How. 172, 183-4 (1849), respondents make the erroneous assertion that the *Erwin* case held only that "a defendant does not waive his right to appeal by paying a judgment entered against him" (Res. Br. 10). What this Court there decided was that voluntary acceptance by the appellant of funds, deposited with a court officer pursuant to an adverse judgment, would not bar his appeal. The decision holds not that a party may *pay* a judgment and appeal, but rather that a party may *accept* benefits under a judgment and still appeal. That ruling, as demonstrated in petitioner's principal brief, conflicts directly with the decision of the court below in this case.

B. Conflict with United States v. Dashiel, 3 Wall. 688 (1866).

Respondents concede that in *United States* v. *Dashiel,* 3 Wall. 688 (1866), a partial satisfaction of appellant's judgment was held no bar to his appeal (Res. Br. 11). But it was upon Spanel's receipt of "partial satisfaction of judgment" that both the respondents and the court below relied (R. 423-4, 431-2, 445). Respondents would avoid the conflict between the Court of Appeals decision and the *Dashiel* case by drawing from the latter case a "clear intimation, *obiter*" that payment of a judgment in full would bar an appeal (Res. Br. 11). Apart from the holding of this Court to the contrary,[2] the judgment here was clearly satisfied in part only.

---

[2] Erwin v. Lowry, 7 How. 172 (1849). See also Embry v. Palmer, 107 U. S. 3 (1882), discussed infra pp. 4-5.

C. Conflict with Jones v. Pettingill, 245 Fed. 269 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917).

The Court of Appeals for the First Circuit held in *Jones* v. *Pettingill,* 245 Fed. 269, 276-7 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917), that acceptance of benefits under a decree and execution of a satisfaction did not operate to waive the right of appeal. The decision rested not upon any claimed mistake as respondents indicate, but upon the absence of an intent to waive appeal. In the *Jones* case full satisfaction was acknowledged three days after the judgment. A motion to reconsider was filed a month later and the appeal prosecuted more than two months later. No tender of the funds the appellant had received was ever made. In the instant case the small cash payment was made voluntarily by the Berkmans and Spanel's notice of appeal was filed only seven days later (R. 403-4). When the contention was made that a waiver had occurred, Spanel promptly resisted and tendered back what he had received (R. 425-6). The decision of the Court of Appeals for the First Circuit and the decision of the Court of Appeals for the Seventh Circuit in the instant case are irreconcilable.

D. The cases on which the respondents rely.

Respondents cite at page 9 of their brief *United States* v. *Benedict,* 261 U. S. 294, 298 (1923), *Woodworth* v. *Chesbrough,* 244 U. S. 79, 82 (1917) and *Crawshay* v. *Soutter,* 6 Wall. 739 (1868). Each of these cases involved a consent to the questioned judgment before its entry. This Court noted in *United States* v. *Benedict* that the final judgment there considered must be treated "as though entered upon its [petitioner's] express consent" (261 U. S. 294, 298).

Embry v. *Palmer,* 107 U. S. 3 (1882), also relied upon at page 9 of respondents' brief, held that an appellant did not waive his right to appeal from portions of a

judgment adverse to him by accepting full payment of amounts awarded him in the judgment appealed from.[3] It is said by the respondents that this case recognizes a general rule that acceptance of benefits precludes an appeal from a judgment, but applies an exception, permitting appeal where the amount received is not in controversy. *Embry* v. *Palmer,* however, specifically avoids "the general question" of what action results in a waiver of the right to appeal. 107 U. S. 3, 8. Further, although the appellant in the *Embry* case had received payment *in full* of all that had been awarded to him by the judgment appealed from, the Court treated *United States* v. *Dashiel,* 3 Wall. 688 (1866) as dispositive of the issues presented. The *Dashiel* case had permitted an appeal in the face of an acceptance of benefits, without reference to the question of whether the benefits accepted were or were not in controversy; indeed, the benefits accepted by the appellant in the earlier case apparently were in controversy. 3 Wall. 688, 689.

II.

Conflict with Rule 62(d), Rules of Civil Procedure, and 28 U.S.C. §1961.

In response to the argument that the holding of the Court of Appeals is practically inconsistent with the rule and statute above cited, the Berkmans say only that they paid the portions of the judgment adverse to them without supersedeas and before any obligation for interest arose. Respondents do not comment upon or discuss the election forced upon litigants by the Court of Appeals either to yield rights under the appeals statute or rights under the rule and statute above cited — a choice contrary to their terms and spirit.

---

[3] Gilfillan v. McKee, 159 U. S. 303, 312 (1895), also relied upon by the respondents (Res. Br. 9), simply follows Embry v. Palmer.

III.

There is No Question of State Law Before This Court.

The sole issue before this Court is Spanel's right to maintain an appeal under a federal statute from a judgment entered by a federal court. Respondents' reliance on *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938), and *Guaranty Trust Company* v. *York,* 326 U. S. 99 (1945), is totally misplaced. The United States Code, Title 28, §1291, confers upon Spanel the right to appeal. Whether he lost that statutory right presents no question of state law. The only questions presented relate to federal appellate practice and the interpretation of a federal statute. The teaching of *Erwin* v. *Lowry,* 7 How. 172 (1849) is that the acceptance of benefits is not a waiver of the statutory right to appeal in the federal courts.

This Court has squarely held that state law may not be taken into account in determining the right to appeal to a United States Court of Appeals. *Ettelson* v. *Metropolitan Life Insurance Company,* 317 U. S. 188, 191 (1942). The effects of an acceptance of benefits under an adverse judgment "though left by the statute to judicial determination are nevertheless to be derived from it and the federal policy which it has dictated."[4] The fact that the substantive rights under the Spanel-Berkman contract were to be determined by Illinois law provides no basis for the claim that the appellate procedure of that state—or of the other states whose decisions are cited—can restrict Spanel's right to appeal under the federal statute.

---

[4] Deitrick v. Greany, 309 U. S. 190, 200-201 (1940). This case concerned the consequences of the violation of a federal statute. See also Prudence Corporation v. Geist, 316 U. S. 89, 95 (1942).

Conclusion.

For the reasons set forth in the petition for writ of certiorari, as well as those set forth above, a writ of certiorari should issue to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

MAX SWIREN,
HUBERT H. NEXON,
Attorneys for Petitioner.

SWIREN & HEINEMAN,
Suite 1406,
135 South LaSalle St.,
Chicago 3, Illinois,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 20 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 660

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN AND DR. SOPHIA BERKMAN,

Respondents.

BRIEF OF RESPONDENTS IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS L. DAILY,
GEORGE J. O'GRADY,
ROBERT MCCLORY,
1900—122 S. Michigan Ave.,
Chicago 3, Illinois,
Attorneys for Respondents.

DAILY, DINES, WHITE & FIEDLER,
1900—122 S. Michigan Ave.,
Chicago 3, Illinois,
Of Counsel.

THE BOOKWORK-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	PAGE
Opinion below	1
Statement of the case	1
Summary of the argument	5
Argument	6
Conclusion	16
Appendix	17

TABLE OF CASES CITED AND AUTHORITIES CITED.

Albright v. Oyster, 60 Fed. 644 (8th C. C. A.)	9
Allen v. Bank of Angelica, 34 Fed. (2d) 658, 659 (2nd C. C. A.)	9
Altman v. Shopping Center, 82 Fed. (2d) 521, 526 (8th C. C. A.)	9
Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134	11
Bates v. Dresser, 251 U. S. 524, 532	16
Boylan v. Boylan, 349 Ill. 471, 473	14
Charm (The), 59 Fed. 476	16
Chase v. Driver, 92 Fed. 780, 786 (8th C. C. A.)	9
Colquette v. Crossett Lumber Co., 149 Fed. (2d) 116, 118 (8th C. C. A.)	9
Credit Bureau of San Diego, Inc. v. Petrasich, 118 Fed. (2d) 470, 471 (9th C. C. A.)	9
Crowshay v. Soutter, 73 U. S. (6 Wall.) 739	9
Denney (In Re), 135 Fed. (2d) 184, 186 (7th C. C. A.) Cert. den. 64 S. Ct. 50, 320 U. S. 747, rehearing den. 64 S. Ct. 155, 320 U. S. 812	9

Embry v. Palmer, 107 U. S. 3, 8 9
Erie Railroad Co. v. Tompkins, 304 U. S. 64 .....5, 13
Erwin v. Lowry, 48 U. S. (7 How.) 172 (1849) 10
Fidelity Union Title & Mortgage Guaranty Co. (In Re), 137 N. J. Eq. 193 14
Gilfillan v. McKee, 159 U. S. 303, 311 9
Guaranty Trust Co. v. York, 326 U. S. 99, 108, 109 13
Hawkins v. Barney Lessee, 5 Pet. 457, 464 15
Holt v. Rees, 46 Ill. 181, 183 14
Jones v. Pettingill, 245 Fed. 269 12
Kaiser v. Standard Oil Co. of N. J., 89 Fed. (2d) 58, 59 (5th C. C. A.) 9
King v. Order of United Commercial Travelers of America, 333 U. S. 153, 157 13
Kraus v. Kraus, 74 N. J. Eq. 417 14
McGowan v. London and Lancashire Indemnity Company of America, 237 Ill. App. 561, 569, 570 16
Meriam v. Haas, 70 U. S. (3 Wall.) 687 .....10, 11
Minot Auto Co. (In Re), 298 Fed. 853, 857 (8th C. C. A.) 9
Morgan v. Ladd (1845), 7 Ill. (2 Gilm.) 415 14
Northwestern Fuel Co. v. Brock, 139 U. S. 216 11
Oriole Phonograph Co. v. Kansas City Fabric Products Co., 34 Fed. (2d) 400, 401 (8th C. C. A.) 9
Peoples v. Lee, 286 Ill. App. 1..... 14
Scott v. Scott, 304 Ill. 267, 272 14
Smith v. Morris, 69 F. (2d) 3, 5 (3rd C. C. A.) 9
Spanel v. Berkman, 171 F. (2d) 513 (7th C. C. A.) 6
Spencer v. Babylon R. Co., 250 Fed. 24 (2nd C. C. A.) 9
United States v. Benedict, 261 U. S. 294, 298 9

United States v. Dashiel, 70 U. S. (3 Wall.) 688 11
Woodworth v. Chesbrough, 244 U. S. 79, 82 9

STATUTES CITED.

28 U. S. C. 400 5
28 U. S. C. 1961 .....5, 16
Rule 62(d) Rules of Civil Procedure 5, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 660

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN AND DR. SOPHIA BERKMAN,

Respondents.

BRIEF OF RESPONDENTS IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the District Court is not officially reported. It appears at pages 391-393 of the record. The opinion of the Court of Appeals is reported in 171 F. (2d) 513, and is set forth at pages 442-45 of the record.

STATEMENT OF THE CASE.

Petitioner's statement of the case is misleading and incomplete. A mere statement of the facts will demonstrate that no important federal question is involved.

Petitioner, A. N. Spanel, filed a complaint in the District Court of the United States for the Northern District

of Illinois against respondents, Dr. Boris Berkman, and his sister, Dr. Sophia Berkman, for a declaratory judgment under Section 274(d) of the Judicial Code, 28 U. S. C. A. § 400. Jurisdiction was based upon diversity of citizenship of the parties and the requisite jurisdictional amount (R. 2).

In his complaint petitioner alleged that on April 5, 1945, he entered into a written contract with the respondents and prayed for a declaration by the Court that this contract was in full force and effect and not terminated (R. 2-4). In their answer respondents alleged that they had performed their contract with petitioner and denied that it was in full force and effect (R. 21).

The contract is set forth at pages 254-265 of the record. Its terms and provisions are succinctly stated in the opinion of the Court of Appeals (R. 442-445).

The District Court made extensive findings of fact, and in its judgment declared and fixed the rights of the parties. In its judgment, which was supported by adequate findings and conclusions of law (R. 393-401), the District Court declared:

> "(4) That the agreement between the plaintiff and the defendants, dated April 5, 1945, was duly determined and terminated on February 16, 1947, in accordance with the provisions of Paragraph 8 of Article II of said agreement, by reason of plaintiff's failure to give notice in writing to either of the defendants of his election to perform or go forward with the terms of Article III of said agreement, and the rights of the plaintiff under said agreement ceased and determined on February 16, 1947, and none of the parties hereto have any claims or obligations to any of the other parties under the terms of said agreement, except as hereinafter stated.
>
> "(5) That the pilot plant * * * materials, equipment * * * are the property of the plaintiff.

"(6) That plaintiff is entitled to the sum of $973.98 remaining unexpended out of the sum of $25,000 furnished by plaintiff to defendants, as provided in said contract, and that plaintiff do have and recover of and from defendants the sum of $973.98." (R. 401-02.)

The sum of $973.98 was awarded to petitioner not because it was inadequate to carry on further research, as implied at page 4 of petitioner's statement of the matters involved, but because the contract between the parties had terminated (R. 400-402).

The judgment of the District Court was entered on October 15, 1947 (R. 402). Consistently with this judgment petitioner took possession of, dismantled and removed the pilot plant. On November 6, 1947, petitioner voluntarily accepted from respondents the payment of the judgment awarded him in the amount of $973.98 and on the same day his attorneys filed a satisfaction of that judgment with the Clerk of the District Court (R. 403). Thereafter, on November 12, 1947, petitioner filed his notice of appeal (R. 404).

Neither party appealed from the judgment awarding to petitioner the sum of $973.98. Petitioner appealed from that portion of the judgment declaring the agreement of the parties terminated and denying him the relief prayed for in his complaint (R. 405). Respondents filed a cross-appeal from that portion of the judgment of the District Court awarding the pilot plant to petitioner (R. 412).

Afterward, on February 16, 1948, respondents filed a motion to dismiss petitioner's appeal (R. 423). This motion was denied by the Court of Appeals on March 2, 1948 without prejudice to respondents' right to renew the motion at the hearing of the cause on its merits (R. 429). Subsequently, on December 20, 1948, the Court of Appeals dismissed petitioner's appeal in Cause No.

9534 and in Cause No. 9535 affirmed the judgment of the District Court awarding the pilot plant and equipment to petitioner (R. 442-51). Respondents have sought no review of the decision of the Court of Appeals awarding the pilot plant and equipment to petitioner.

SUMMARY OF THE ARGUMENT.

I.

Petitioner's acceptance of the benefits of the judgment upon the theory that the contract was terminated precluded him from claiming in the Court of Appeals that the contract was still in force. A litigant cannot avail himself of the advantages of a judgment and then question its disadvantages in a court of review. This rule is applied uniformly in every court, federal and state, and does not conflict with any decision of this court.

II.

The essence of diversity jurisdiction is that the federal courts enforce State law, and that was done in this case. By urging this court to adopt a rule in conflict with the Illinois decisions, the petitioner is seeking a reversal of the policy established by this court in *Erie* v. *Tompkins,* 304 U. S. 64.

III.

Rule 62(d) of the Federal Rules of Civil Procedure relating to stays of execution has no relevance to the present case as no stay of execution was here applied for or granted. Petitioner voluntarily accepted full payment of the judgment awarded to him in the amount of $973.98 and satisfied it (R. 403). His argument upon this point is hypothetical and wholly inapplicable.

Nor does 28 U. S. C. 1961, relating to interest on judgments, have any relevance here. The petitioner collected his judgment and is not entitled to interest. It is the settled rule that a party who appeals from a judgment in his favor is not entitled to interest until the appeal is disposed of in a court of review.

ARGUMENT.

I.

A Litigant Cannot Accept the Benefit of a Judgment and Then Seek Its Reversal in a Court of Review. This Rule Is Applied Uniformly and Constantly in Every Court and Does Not Conflict With Any Decision of This Court.

No rule is better settled than that applied by the Court of Appeals in this case. This was an action requiring a declaration of rights. The issue was simple. Petitioner contended that his contract with respondents was in full force and effect. Respondents contended that they had performed the contract and that the rights of petitioner thereunder had ceased.

The District Court declared the contract terminated and awarded to petitioner the unexpended money as well as the pilot plant and equipment. Petitioner's conduct in accepting the balance of the funds and the pilot plant is consistent only with the judgment declaring the contract terminated. This fact appears clearly from the opinion of the Court of Appeals, where it said (171 F. (2d) 513, 516. (R. 447-449)):

> "We are unable to discern how it can be contended with any degree of seriousness that the instant situation comes within either of the exceptions to the general rule. The money award in favor of the plaintiff was not independent and separable from the remainder of the judgment and neither was plaintiff entitled to such award in any event. The judgment on its face and the issues upon which plaintiff sought a declaration of rights plainly disclose that the money award was made and could have been made only as a con-

> dition subsequent to and depending upon the termination of the agreement. Plaintiff's receipt of that sum and satisfaction of the judgment in that respect is consistent only with the findings and judgment declaring the parties' agreement terminated. The obvious effect of a reversal of that portion of the judgment appealed from by the plaintiff would be to leave the contract in force. Presumably under such circumstances the defendants would be required to resume experimentation and research without the benefit of the balance of the funds which have by the judgment been awarded to the plaintiff and received by him."

Concededly petitioner had the right to accept or reject the benefits he obtained by the judgment of the District Court. He chose to accept these benefits. He obtained payment of the unexpended funds in the amount of $973.98 (R. 403). He took title to and possession of the pilot plant and equipment valued at the sum of $9,440.09 (R. 381-382). The benefits thus obtained by petitioner by virtue of the judgment of the District Court had a total value in cash and property of over $10,000.00.

Under the circumstances presented in this case what further or other declaration of rights could any court of review make? Petitioner has the balance of the funds and the pilot plant. Without these, respondents could not be required to perform their contract further. True, petitioner later offered to deposit the funds with the Clerk of the Court of Appeals. Presumably he will offer to deposit the pilot plant and equipment with the Clerk of this Court. Petitioner neglects, however, to explain how this Court or the Court of Appeals can obtain jurisdiction over these vital portions of the judgment which have become conclusive on the parties. Neither party appealed from the judgment awarding to petitioner the sum of $973.98. The Court of Appeals affirmed that portion of the judgment

of the District Court declaring that petitioner was entitled to the pilot plant and equipment (R. 449, 450) but neither petitioner nor respondents filed any petition for rehearing or writ of error to review that portion of the decision of the Court of Appeals.

The right to proceed on a judgment and enjoy its fruits and the right of appeal are not concurrent. Petitioner's election to take one course was a renunciation of the other. It would be manifestly unjust to permit petitioner to take the money and the pilot plant and at the same time to permit him to speculate upon the chance of obtaining a different judgment in a court of review. Under the theory advanced by petitioner he can have his cake and eat it too. He can contend that the contract is in effect and is also terminated. No such rights are given respondents. They devoted over a year and a half of their lives in the performance of this contract without any remuneration (R. 242, 380, 383). They have received offers from other institutions and persons to finance their invention but they are precluded from entering into other contracts for the exploitation of their product while petitioner continues to litigate (R. 249, 250).

This is not a case where alternative remedies are afforded a litigant. Either the contract was in force or it was terminated. Petitioner chose to take back his investment. He had no right to the money or to the pilot plant if the contract was still in effect. If petitioner's theory is correct then a litigant has the privilege of taking back the money and property he is required to furnish under a contract, and when his right to take such a position is questioned he may undo his wrong by merely offering to deposit with the clerk of the court the money and property. There is no risk attached to such a theory. If this theory were adopted it would behoove every litigant to grasp what he could get in a trial court upon any principle

of law and see if he could secure more in a court of review. Presumably under this theory the principles of estoppel by contract, by deed and by conduct would be abandoned while each litigant raced to a court of review with his offer to do equity provided he got more.

The rule applied by the Court of Appeals in this case is one of universal application. It has been a long established principle that a litigant "cannot hold what it accepted and demand more". See: *United States* v. *Benedict*, 261 U. S. 294, 298; *Woodworth* v. *Chesbrough*, 244 U. S. 79, 82; *Crowshay* v. *Soutter*, 73 U. S. (6 Wall.) 739. The rule, as well as its exceptions, was recognized by this Court in *Gilfillan* v. *McKee*, 159 U. S. 303, 311 and *Embry* v. *Palmer*, 107 U. S. 3, 8. Both of these last mentioned decisions were considered and distinguished by the Court of Appeals in its opinion (R. 446-448).

The argument that there is a conflict of decisions in the Courts of Appeals regarding the application of this rule is wholly without merit. The rule is well settled in the federal Courts of Appeal. *Albright* v. *Oyster*, 60 Fed. 644 (8th C. C. A.); *Chase* v. *Driver*, 92 Fed. 780, 786 (8th C. C. A.); *Spencer* v. *Babylon R. Co.*, 250 Fed. 24 (2nd C. C. A.); *In Re Minot Auto Co.*, 298 Fed. 853, 857 (8th C. C. A.); *Allen* v. *Bank of Angelica*, 34 F. (2d) 658, 659 (2nd C. C. A.); *Oriole Phonograph Co.* v. *Kansas City Fabric Prod. Co.*, 34 F. (2d) 400, 401 (8th C. C. A.); *Smith* v. *Morris*, 69 F. (2d) 3, 5 (3rd C. C. A.); *Altman* v. *Shopping Center*, 82 Fed. (2d) 521, 526 (8th C. C. A.); *Kaiser* v. *Standard Oil Co. of N. J.*, 89 F. (2d) 58, 59 (5th C. C. A.); *Credit Bureau of San Diego, Inc.* v. *Petrasich*, 118 F. (2d) 470, 471 (9th C. C. A.); *In Re Denney*, 135 F. (2d) 184, 186 (7th C. C. A.) Cert. den. 64 S. Ct. 50, 320 U. S. 747 rehearing den. 64 S. Ct. 155, 320 U. S. 812; *Colquette* v. *Crossett Lumber Co.*, 149 F. (2d) 116, 118 (8th C. C. A.).

In fact, no rule is better settled in American jurisprudence. We respectfully refer this Court to the decisions of State Courts set forth in the appendix. The cases there listed are not cited as authorities to support the rule, which indeed requires no such citation, but are given as illustrations of the universal way in which the rule is accepted and applied.

A review of the cases cited by the petitioner will show that they either are not in point or come within the exceptions to the rule.

The case most relied upon by petitioner is *Erwin* v. *Lowry*, 48 U. S. (7 How.) 172 (1849). In that case the Supreme Court of Louisiana held that plaintiff, Lowry, was entitled to the possession of certain slaves and real property but ordered that no writ issue to put him into possession until he paid the sheriff or the defendant, Erwin, the sum of $436.55. No money judgment was entered against Lowry. He paid this sum in order to make his judgment operative. Manifestly Lowry could not perform a condition imposed upon him before he could obtain the benefit of his own judgment and then contend that the performance of that condition precluded Erwin from questioning the judgment. As this Court stated Lowry could not "complain of his own voluntary acts." In effect all this Court decided in that case was that a defendant does not waive his right to appeal by paying a judgment entered against him. This is a common occurrence in case of an appeal without a *supersedeas*. Thus it will be seen that there is no similarity between the facts or principles involved in the Lowry case and the case under consideration. In our case there were no strings or conditions attached to the judgment entered in favor of petitioner. It was a plain money judgment. Petitioner here was not compelled to do anything.

The next case cited by petitioner is *Merriam* v. *Haas*,

70 U. S. (3 Wall) 687. The plaintiff in that case did not take any inconsistent position. He claimed the full amount due him on a mortgage. He was awarded less and appealed. A note to the case shows that upon reversal the plaintiff was awarded the full amount of the mortgage.

Petitioner also cites *United States* v. *Dashiel,* 70 U. S. (3 Wall) 688. In that case this Court held that a partial satisfaction of a money judgment would not operate as an extinguishment of the judgment. Whether the majority opinion in that case reached the correct conclusion might be debated, but that is not important, since the opinion contains a clear intimation, *obiter,* that if payment of the judgment had been "in full", the result would have been different (p. 702). The decision hence has no application here, since petitioner accepted payment in full of the money judgment which was awarded to him, and took possession of the pilot plant and equipment which were held by the District Court to belong to him, thus taking full advantage of the judgment, so far as it was in his favor.

The last two mentioned decisions may be distinguished further upon the ground that the plaintiffs in those cases were entitled to recover, in any event, the portion of the judgment awarded them. The petitioner here, as the Court of Appeals points out, was not entitled in any event to his judgment (R. 447).

Petitioner next cites cases holding that a wrongdoer will be required to make restitution where his adversary appeals and obtains a reversal of the judgment. There is hardly room for controversy as to this proposition. As this Court pointed out in *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, cited by petitioner herein, the right of restitution has been recognized in the law of England and America from a very early period. Similarly in *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, also cited by petitioner, this Court stated that where

"plaintiff had judgment and execution, it was regularly a part of the judgment of reversal" that the defendant be restored to all things he lost by reason of the judgment. However, in the case at bar the respondents are not asking for restitution. None of these decisions call for the application of the rule that a litigant who accepts the benefits of a judgment cannot question its disadvantages in a court of review.

Another case which petitioner relies upon as upholding his theory is *Jones* v. *Pettingill*, 245 Fed. 269. In that case plaintiffs sought an adjudication that they were entitled to a one-half interest in a plantation. The District Court decreed that plaintiffs were entitled to an interest in the property upon the payment to the defendant of a certain sum owed on a mortgage and for improvements. This decree required the defendant to file a receipt for this money with the registry of the court. Defendant, unlike the petitioner in the case at bar, did not acquiesce in the judgment. He filed a motion to set it aside. He filed a supersedeas bond. He did not acknowledge satisfaction of the judgment except as directed by the decree. It appears clearly from the decision that the defendant "mistakenly supposed himself under the necessity of receiving the money and filing the receipt therefor." The petitioner herein makes no such claim. He voluntarily filed a satisfaction of the judgment and he was not ordered to do so by the District Court (R. 403, 401).

II.

The Essence of Diversity Jurisdiction Is That the Federal Courts Enforce State Law and That Was Done in This Case.

The contract upon which petitioner sought a declaration of rights was executed and performed in the State of Illinois (R. 165, 211, 266). No federal question is involved. The case presents a dispute between private citizens regarding a private contract.

For purposes of diversity jurisdiction a federal court is "in effect, only another court of the State". It has been said that "in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court". *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, 109; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The Constitution conferred jurisdiction on the federal courts in order to prevent apprehended discrimination against non-residents. Its purpose was not to give non-residents greater rights than a State would accord its own citizens. "So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts". *King* v. *Order of United Commercial Travelers of America,* 333 U. S. 153, 157. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in diversity cases is the law of the State. *Erie* v. *Tompkins,* 304 U. S. 64.

There would be no doubt regarding the outcome of this case if it had been presented to the Supreme Court of Illinois. It, in common with the rest of the States, has declared: "The rule of law is well established that a party to a decree cannot avail himself of those parts of the decree which are beneficial to him and afterwards prosecute a writ of error to reverse the part which is unfavorable to him." *Boylan* v. *Boylan,* 349 Ill. 471, 473; *Scott* v. *Scott,* 304 Ill. 267, 272; *People* v. *Lee,* 286 Ill. App. 1; *Holt* v. *Rees,* 46 Ill. 181, 183. The position assumed by petitioner is directly contrary to the decisions of the Supreme Court of Illinois commencing a century ago with *Morgan* v. *Ladd* (1845) 7 Ill. (2 Gilm) 415, where the court declined to permit the appellant to bring into court the money which he received in satisfaction of the judgment which he later sought to reverse upon a writ of error.

The injustice and confusion incident to the theory asserted by petitioner become apparent when we consider that he, as a resident of New Jersey, could not go into his own State Courts and advance such an argument. The New Jersey courts hold: "The rule is that when a litigant accepts the benefit awarded him by a judgment or decree he is precluded from afterward challenging the validity of the conditions by an appeal". *In re Fidelity Union Title & Mortgage Guaranty Co.,* 137 N. J. Eq. 193; *Kraus* v. *Kraus,* 74 N. J. Eq. 417.

The mischievous results of a so-called federal general rule at variance with State decisions were recognized and corrected by this Court in *Erie* v. *Tompkins,* 304 U. S. 64. In that decision this Court closed the chasm which prevented uniformity of law between federal and state courts. It would serve no purpose to create a new monster to take the place of the old which this Court laid to rest.

The *lex loci* should be "the governing rule of private right under whatever jurisdiction private right comes to be examined." *Hawkins* v. *Barney Lessee,* 5 Pet. 457, 464.

The Court of Appeals applied the law of Illinois in this case which, we submit, is in harmony with the decisions of this Court and the repeated holdings of other federal Courts of Appeal.

III.

There Is No Inconsistency Between the Decision of the Court of Appeals in This Case and Rule 62(d) and 28 U. S. C. 1961.

Petitioner's argument under this point is ridiculous and frivolous. If the contract was in full force and effect then plaintiff was not entitled to the judgment awarding him the balance of the funds and the pilot plant. As applied to the present case, the petitioner cannot assert that the contract between him and respondents is still in force and effect and at the same time have and enjoy benefits which only flow from a termination of the contract.

Whether the petitioner agreed or disagreed with the judgment of the District Court finding the contract at an end, there was no occasion for any party to invoke Rule 62(d) for a stay of execution. If petitioner disagreed with that part of the judgment which awarded money to him there was no reason for him to collect the fruits which only inured to him upon termination of the contract. If he agreed, as his conduct indicated, a stay of execution would nevertheless be available to the respondents under Rule 62(d), or they could pay the judgment, as was done in this case. Had the petitioner refused the payment, respondents could have deposited the money with the Clerk of the Court.

Nor does the holding of the Court of Appeals have any effect upon 28 U. S. C. 1961 allowing interest on judgments. This point is moot because petitioner has collected his judgment and is not entitled to interest. Moreover, it is the settled rule that a party who appeals from a judgment in his favor is not entitled to interest on the judgment. The party who appeals puts it out of the power of the opposite party to pay the judgment. Under such circumstances there would be no enforceable judgment until the appeal was disposed of in a court of review. Interest in such cases is never allowed during the pendency of an appeal. *The Charm*, 59 Fed. 476; *Bates* v. *Dresser*, 251 U. S. 524, 532; *McGowan* v. *London and Lancashire Indemnity Company of America*, 237 Ill. App. 561, 569, 570.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS L. DAILY,
GEORGE J. O'GRADY,
ROBERT MCCLORY,
1900—122 S. Michigan Ave.,
Chicago 3, Illinois,
Attorneys for Respondents.

DAILY, DINES, WHITE & FIEDLER,
1900—122 S. Michigan Ave.,
Chicago 3, Illinois,
Of Counsel.

APPENDIX.

Representative State Decisions Illustrating the Rule Applied by the Court of Appeals in This Case.

Shannon Copper Co. v. *Potter,* 14 Ariz. 481, 131 P. 157, 158.

Wolford v. *Warfield,* 170 Ark. 82, 278 S. W. 639.

Giometti v. *Etienne,* 5 Calif. 2d 411, 55 P. 2d 216.

McMullen v. *Fort Pierce Financing & Construction Co.,* 108 Fla. 492, 146 So. 567.

Grizzel v. *Grizzel,* 190 Ga. 219, 9 S. E. 2d 247.

Boylan v. *Boylan,* 349 Ill. 471, 473, 182 N. E. 614.

Holt v. *Rees,* 46 Ill. 181, 183.

McGowan v. *London and Lancashire Indemnity Company of America,* 237 Ill. App. 561, 569, 570.

Morgan v. *Ladd,* (1845) 7 Ill. (2 Gilm) 415.

Peoples v. *Lee,* 286 Ill. App. 1, 3 N. E. 2d 389.

Scott v. *Scott,* 304 Ill. 267, 272, 136 N. E. 659.

McCraken v. *Cabel,* 120 Ind. 266, 22 N. E. 136.

Kelly, Shuttleworth & McManus v. *Central Nat'l. Bk. & Tr. Co.,* 217 Iowa 725, 248 N. W. 9, 16.

Ralston v. *Ralston,* 125 Kan. 619, 264 P. 146, 147.

Graves v. *Allen,* 208 Ky. 764, 271 S. W. 1077.

Silverberg v. *Silverberg,* 148 Md. 682, 130 A. 325, 327.

Mastin v. *May,* 130 Minn. 281, 153 N. W. 756.

In re Block's Estate, 32 Mont. 51, 79 Pac. 554.

Winsor v. *Schaeffer,* 224 Mo. App. 1220, 34 S. W. 2d 989, 990.

Hoesly v. *Dept. of Roads & Irrigation,* 142 Neb. 383, 6 N. W. 2d 365.

In re Fidelity Union Title & Mortgage Guaranty Co., 137 N. J. Eq. 193, 44 A 2d 205, 208.

Evarts v. *Stovall,* 42 N. M. 32, 75 P. 2d 154.

Metropolitan Trust Co. v. *Long Acre Electric Co.,* 223 N. Y. 69, 119 N. E. 233, 234.

McCarty v. *Lumry,* 173 Okla. 472, 49 P. 2d 188.

Richmond v. *White,* 98 Oregon 310, 193 P. 1026, 1029.

Ullery v. *Clark,* 18 Pa. 148.

Texas Employers' Ins. Ass'n. v. *King,* 52 S. W. 2d 668 (Ct. of Civil Appeals of Texas).

Cornia v. *Cornia,* 80 Utah 486, 15 P. 2d 631, 632.

Chesapeake & Ohio Ry. Co. v. *Lane,* 113 W. Va. 51, 166 S. E. 698, 699.

Hanson v. *Chicago & L. S. Ry. Co.,* 167 Wis. 335, 167 N. W. 450.